

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE

PAMELA E. HANCOCK,)	
)	
Employee/Grievant,)	
)	
v.)	DOCKET No. 12-02-534
)	
DEPARTMENT OF HEALTH AND SOCIAL)	DECISION AND ORDER
SERVICES,)	
)	
Employer/Respondent.)	

After due notice of time and place, this appeal came to a hearing before the Merit Employee Relations Board (the Board) at 9:00 a.m. on June 20, 2013 at the Public Service Commission Conference Room, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Martha K. Austin, Chair, Paul R. Houck, John F. Schmutz, Dr. Jacqueline Jenkins, and Victoria D. Cairns, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

W. Michael Tupman
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

John C. Andrade, Esquire
on behalf of the Employee/Grievant
Pamela E. Hancock

Laura L. Gerard
Deputy Attorney General
on behalf of the Department of
Health and Social Services

BRIEF SUMMARY OF THE EVIDENCE

The Department of Health and Social Services (DHSS) offered and the Board admitted into evidence without objection eight documents marked for identification as Exhibits A-G and K.

The employee/grievant, Pamela E. Hancock (Hancock), offered and the Board admitted into evidence two documents marked for identification as Exhibits 3 and 4.

After hearing Hancock's opening statement, DHSS renewed its motion to dismiss for failure to state a claim upon which relief can be granted as a matter of law. The Board asked Hancock's counsel for a more detailed proffer of proof to support her grievance.

Hancock's counsel proffered that she and Anne Farley, the former Director of the Division of State Services, would testify that in 1999 Hancock was performing all of the job duties of a Telecommunications/Network Technician III and Hancock should have been classified in that position rather than as an Applications Support Specialist in a lower pay grade. According to Hancock, if she had been properly classified, she would have been within the class for which DHSS determined there was a critical shortage, and for which the Office of Management and Budget (OMB) approved an advance starting salary with a leveling up for lower paid employees within the same class and geographic area.

After considering Hancock's proffer of proof, the Board granted the agency's motion and dismissed the grievance for failure to state a claim for a violation of the Merit Statutes or the Merit Rules.

FINDINGS OF FACT

Before January 2001, Hancock worked as an Applications Support Specialist in the DHSS Division of Management Services. In January 2001, her position was re-classified to a Telecommunications/Network Technician III, pay grade 15.

In 1999, DHSS determined that there was a critical shortage of telecommunications technicians at DHSS. DHSS asked the Office of Management and Budget (OMB) to approve a starting rate for Telecommunications/Network Technician III above the minimum pay grade. OMB approved the request and “leveled up” all lower paid equally qualified employees in the same class within the same geographic area.

According to Hancock, at the time she was an Applications Support Specialist but she was performing all of the job functions of a Telecommunications/Network Technician III. According to Hancock, if she had been properly classified she also would have benefitted from the leveling up.

Hancock’s position was re-classified in January 2001 to the position of Telecommunications/Network Technician III. According to Hancock, she should have been leveled up like the technicians the previous year. However, Hancock did not make any showing that DHSS determined there was a continuing critical shortage of technicians and that OMB approved an advance starting rate and a leveling up.

CONCLUSIONS OF LAW

Merit Rule 4.4.3 provides:

Upon agency request, the Director may approve a starting rate above the minimum for the paygrade where a critical shortage of applicants exists. The Director and Controller General may provide that all lower paid, equally qualified employees in the same class within the same geographic area receiving a lower rate shall also have their pay rates set as stated above if their performance is satisfactory.

The Board concludes as a matter of law that Hancock failed to state a claim under Merit Rule 4.4.3 for which relief can be granted.

In 1999, DHSS determined there was a critical shortage of telecommunications technicians and OMB approved a starting rate above the minimum paygrade and a leveling up of “all lower paid, equally qualified employees *in the same class*.” MR 4.3.3 (emphasis added). At the relevant time, Hancock was not in the same class as those technicians who received a pay increase. OMB did not re-classify her position as a Telecommunications/Network Technician III until January 2001.

Hancock cannot state a claim for a violation of the Merit Rules by assuming, or even proving, that her position was not properly classified in 1999. The “Delaware General Assembly has made it clear in the [Budget Act] that grievances involving critical reclassifications or the determination of paygrade are not within the jurisdiction of the [MERB].” *Parker v. Department of Correction*, C.A. No. 99A-06-010-FSS, 2000 WL 973318, at p.1 (Del. Super., May 25, 2000).

If Hancock believed that she was performing all of the duties of a higher position in 1999, then her remedy was to grieve under Merit Rule 3.2 (working out of class). Merit Rule 3.2 would not have entitled her to a re-classification, but may have entitled her to “be compensated

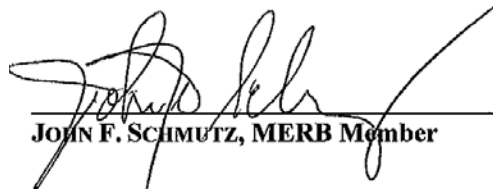
appropriately from the first day of service in the higher position.”

DECISION AND ORDER

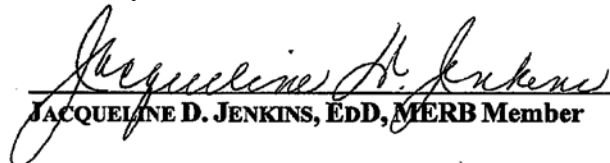
It is this 22nd day of July, 2013, by a vote of 5-0, the Decision and Order of the Board to deny Hancock’s appeal.


MARTHA K. AUSTIN, MERB Chairwoman


VICTORIA D. CAIRNS, MERB Member


JOHN F. SCHMUTZ, MERB Member


PAUL R. HOUCK, MERB Member


JACQUELINE D. JENKINS, EDD, MERB Member

APPEAL RIGHTS

29 *Del. C.* §5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof on any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court must be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 *Del. C.* §10142 provides:

(a) Any party against whom a case decision has been decided may appeal such decision to the Court.

(b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.

(c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.

(d) The court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing date: **July 22, 2013**

Distribution:

Original: File

Copies: Grievant
Agency's Representative
Board Counsel

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